(2)

No. 91-1010

IN THE

Supreme Court of the United States

October Term, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
Petitioner,

v.

METCALF & EDDY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the First Circuit correctly dismissed for want of jurisdiction an appeal from an interlocutory order denying summary judgment on a claim of Eleventh Amendment immunity raised by a Puerto Rican public corporation, where the merits of the claim could not be determined, at least in its favor, solely as a matter of law.

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BRIEF IN OPPOSITION

Respondent, Metcalf & Eddy, Inc. ("M&E"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the First Circuit's decision in *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10 (1st Cir. 1991). The First Circuit properly dismissed for want of jurisdiction an appeal from an interlocutory order denying summary judgment on a claim of Eleventh Amendment immunity raised by a Puerto Rican public corporation. The First Circuit's decision is in accord

with the decisions of the other courts of appeals; when faced with a claim of Eleventh Amendment immunity that could not be determined, at least in the movant's favor, solely as a matter of law, all other courts of appeals have similarly denied interlocutory review. When viewed in the full light of its particular circumstances, this case does not suitably present an issue warranting this Court's review.

JURISDICTIONAL STATEMENT

The district court denied the motion for summary judgment on a claim of Eleventh Amendment immunity brought by the Puerto Rico Aqueduct and Sewer Authority ("PRASA"), petitioner herein, on May 17, 1991. The First Circuit dismissed PRASA's appeal for want of jurisdiction on September 25, 1991. Pet. App. A-8. PRASA filed its petition for a writ of certiorari on December 23, 1991.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, M&E draws the Court's attention to certain relevant factual errors and omissions in the petition.

I.

PARTIES TO THIS CASE

M&E is a corporation[1] internationally renowned for its expertise in wastewater treatment. C.A. App. 4-5. It has provided project management services to various federal, state and private entities, as well as to public corporations operating as private enterprises, such as PRASA. *Id.* 5.

[1]Pursuant to Supreme Court Rule 29.1, respondent states that Metcalf & Eddy Companies Inc. is the parent company of Metcalf & Eddy, Inc. and Air & Water Technologies Corp. is the parent company of Metcalf & Eddy Companies Inc.

PRASA is a public corporation, separately incorporated under Puerto Rican law. *Id.* 5. It is not subject to the general laws governing the administration of the Commonwealth of Puerto Rico, but is responsible for its own administration. It is "autonomous" and has "complete control and supervision of its properties and activities." P. R. Laws Ann. tit. 22 §§ 142, 144(j) (1988). PRASA is obligated to fix its rates and charges so as to fund, with a safety margin, the maintenance, repair and operation of its water and sewer systems. *Id.*, § 158. It may borrow money, issue revenue bonds, and make contracts. *Id.*, §§ 144(d), 144(g). It has the power to sue and be sued in its own corporate name. *Id.*, § 144(c). PRASA is prohibited from pledging the credit or the taxing power of the Commonwealth. *Id.*, § 144. Most importantly, by statute, PRASA's obligations are not debts of the Commonwealth and must be paid out of PRASA's funds. *Id.*; *see also* C.A. App. 65 (PRASA bond prospectus representing that bonds are not debts of the Commonwealth).

The courts of the Commonwealth of Puerto Rico have consistently treated PRASA as a private enterprise separate and distinct from the Commonwealth government. The Supreme Court of Puerto Rico has concluded that PRASA was "unquestionably framed as a private enterprise or business and in fact operates as such." *A.A.A. v. Union de Empleados A.A.A.*, 105 P.R. Dec. 437, 456-57, 5 O.T. 602, 628 (1976). In reaching this conclusion, the Supreme Court considered the statutory provisions creating PRASA and noted that PRASA "enjoys an extraordinary fiscal and administrative autonomy. Its structure, as well as its powers and authorities, are basically similar to those of a private enterprise." 105 P.R. Dec. at 456, 5 O.T. at 627. It concluded that an "overwhelming combination of factors [lead]

to the conclusion that [PRASA] operates as a private enterprise or business." 105 P.R. Dec. at 457, 5 O.T. at 629; *see also Canchani v. C.R.U.V.*, 105 P.R. Dec. 352, 356-57, 5 O.T. 485, 489-90 (1976) (PRASA has "judicial personality *independent* of the Commonwealth of Puerto Rico") (emphasis in original); *Arraiza v. Reyes*, 70 P.R.R. 583, 586-87 (1949) (collecting evidence of PRASA's autonomy and concluding "the Legislature clearly indicated its intention to the effect that this authority would be as amenable to judicial process as any private enterprise would be under like circumstances").

II.

BACKGROUND TO THIS SUIT

The contractual relationship between M&E and PRASA grew out of an enforcement action brought against PRASA by the United States Environmental Protection Agency ("EPA"). In 1985, the EPA suit culminated in a Consent Order (modified in 1988) that, among other things, imposed a rigorous schedule of improvements to PRASA's eighty-three existing wastewater treatment plants and restricted additional sewage connections to thirty-eight of these plants. C.A. App. 6-7.

In March 1986, PRASA negotiated and contracted with M&E for project management services for the Consent Order's rehabilitation work. *Id.* 9. M&E immediately began providing those project management services. *Id.* 10. Over the next several years, M&E successfully met the deadlines established in the EPA Consent Order. *Id.* 11-12. PRASA has claimed no defects in M&E's workmanship, in the equipment supplied by M&E, or in the workmanship of Puerto Rican subcontractors hired and paid directly by

M&E. M&E commenced this suit when PRASA failed to pay M&E over $37 million for services rendered, for monies M&E advanced to Puerto Rican subcontractors, and for equipment purchased for PRASA under the contract. *Id.* 13.[2] M&E has also claimed damages to its business reputation in excess of $10 million. *Id.* 18.

III.

PROCEDURAL HISTORY OF THIS SUIT

After M&E commenced suit in September, 1990, PRASA initially moved to dismiss on the sole ground that M&E had failed to join an indispensable party. The district court denied that motion. In February 1991, PRASA moved for reconsideration and also for dismissal on the new ground that it was immune from suit under the Eleventh Amendment. In an attempt to overcome the statutory and case law against its position, PRASA submitted affidavits and documents to the district court, alleging certain facts regarding its operations. *Id.* 37-140. These were controverted by an affidavit and document submitted by M&E. *Id.* 162-65. The district court denied PRASA's motion for reconsideration and dismissal. Pet. App. A-9.

In June, 1991, PRASA appealed from that part of the Order denying its motion to dismiss on the ground of a

[2] Part B of PRASA's Statement of the Case is not relevant to the Court's consideration of the petition. Moreover, Part B is unsupported by any citations to the record and does not fairly explain the facts underlying the parties' dispute. PRASA had conducted two internal audits of the agreement in 1987, both of which concluded that M&E's invoices and billing practices were proper. C.A. App. 16 (M&E's Amended Complaint). The audit by the Puerto Rico Infrastructure Financing Authority in 1990 was not conducted in accordance with generally accepted auditing principles and used improper statistical sampling techniques. *Id.* 16-17. Although PRASA had promised to continue paying M&E during the course of the 1990 audit, PRASA withheld millions of dollars in payments, even as it continued to receive and accept additional equipment and services from M&E. *Id.* 17.

claimed Eleventh Amendment immunity. Shortly thereafter, it requested that the First Circuit stay the proceedings in the district court until the appeal was decided. On June 28, 1991, the First Circuit concluded that PRASA had demonstrated neither a probability of success on the merits nor a threat of irreparable injury and denied PRASA's application for a stay. *Id.* A-11-12. In denying the stay, the First Circuit stated that there was "substantial doubt" that "PRASA is sufficiently an arm of the state to qualify for the protection of the Eleventh Amendment." *Id.* A-12 (quoting *Paul N. Howard v. Puerto Rico Aqueduct and Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985)).

IV.

ONGOING ACTION IN THE DISTRICT COURT

Although PRASA did not begin to conduct discovery until the First Circuit denied its application for a stay in June 1991, PRASA has engaged in substantial discovery since then. Between August and November 1991, it served several sets of written discovery and required M&E to produce 1,500 boxes containing more than one million M&E documents. From October 1991 to the present, PRASA has taken twenty-eight depositions of M&E's current and former employees in cities ranging from Boston to Phoenix to San Juan. Discovery has been conducted on the subjects of both the underlying dispute and PRASA's claim of Eleventh Amendment immunity. According to an Initial Scheduling Conference Order issued by the district court, all depositions must be completed by mid-March 1992, and the case is scheduled for trial beginning May 18, 1992. These deadlines were confirmed at a status conference held by the district court on January 7, 1992.

REASONS FOR DENYING THE PETITION

I.

THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS OVER THE APPEALABILITY OF AN INTERLOCUTORY DENIAL OF A CLAIM OF ELEVENTH AMENDMENT IMMUNITY THAT CANNOT BE DETERMINED SOLELY AS A MATTER OF LAW.

The decision of the First Circuit was correct. There is no conflict among the courts of appeals over the appealability of an interlocutory denial of a claim of Eleventh Amendment immunity that cannot be determined solely as a matter of law in the movant's favor. When faced with such a claim, the First, Second, Fifth and Sixth Circuits all have denied interlocutory review, or stated that they would do so. No circuit has held to the contrary.

PRASA's feigned conflict results from a fundamental misreading of the cases it cites. *Cf.* Pet. 11-12. Two of the decisions that PRASA claims "directly conflict" with the First Circuit decision instead held precisely what the First Circuit held: that interlocutory orders denying claims of Eleventh Amendment immunity were *not* immediately appealable. *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 504 (2d Cir. 1990); *Corporate Risk Management Corp. v. Solomon*, Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001 (6th Cir. July 2, 1991), *petition for cert. filed on other grounds sub nom. Coleman v. Corporate Risk Management Corp.*, 60 U.S.L.W. 3388 (U.S. Nov. 8, 1991) (No. 91-766). In *Yonkers*, the Second Circuit held that it lacked jurisdiction because the Eleventh Amendment immunity claim could not be determined solely as a matter of law:

> Denials of motions to dismiss on grounds of immunity, including Eleventh Amendment immunity, are not appealable [under *Cohen v. Beneficial Industrial Loan*

> *Corp.*, 337 U.S. 541 (1949)] unless the immunity defense can be decided *solely as a matter of law*... Thus, we have ruled that the *Cohen* doctrine does not authorize an immediate appeal where "the immunity issue turns on disputed questions of fact,"... or where the motion to dismiss is addressed to the complaint and the pleading itself does not reveal the degree to which the conduct complained of may fall within the scope of the immunity...

893 F.2d at 502-03 (emphasis added; citations omitted); *see Smith v. Reagan*, 841 F.2d 28, 31 (2d Cir. 1988) (dictum) (claim of Eleventh Amendment immunity may not be immediately appealable if there is a need for discovery or other pretrial proceedings related to the issue). In the *Corporate Risk* case, the Sixth Circuit held that *Cohen*'s finality requirement was not met where the state commissioners' Eleventh Amendment immunity claim raised factual issues. 1991 U.S. App. LEXIS 15001 at *5; *see also Hartman v. Univ. of Kentucky Athletic Ass'n*, Nos. 90-5821, 90-5837, 1991 U.S. App. LEXIS 8451 (6th Cir. April 24, 1991) (unpublished opinion) (court lacked jurisdiction to hear appeal from denial of motion for summary judgment where there were disputed fact issues).

PRASA also erroneously asserts that the Court of Appeals for the Fifth Circuit is in conflict with the First Circuit. *Cf.* Pet. 11. In fact, the Fifth Circuit has similarly stated that interlocutory appeal of a denial of an Eleventh Amendment immunity claim will be allowed "only if, as here, the immunity defense turns upon an issue of law and not of fact." *Stem v. Ahearn*, 908 F.2d 1, 3 (5th Cir. 1990) (not cited by PRASA).[3]

[3]The Ninth Circuit has similarly held that it will not exercise its jurisdiction under 28 U.S.C. § 1292(b) where the issue involved in the denial of a claim of Eleventh Amendment immunity is "not exclusively one of law." *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, No. 90-56200, 1991 U.S. App. LEXIS 4841 at *4 (9th Cir. March 20, 1991) (unpublished opinion). Moreover, the Ninth Circuit noted that the district court's determination was "not controlling since the question may so easily be revisited by the district court at any time." *Id.* This disposition indicates that the Ninth Circuit would likely follow the rest of the circuits when faced with an interlocutory appeal of this sort brought under 28 U.S.C. § 1291.

The circuits are implementing in the Eleventh Amendment context the same approach taken in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), for claims of qualified immunity. In *Mitchell*, this Court held that the denial of a claim of qualified immunity, "to the extent that it turns on an issue of law," is immediately appealable. *Id.* at 530.[4] The other cases cited by PRASA simply apply this principle to claims of Eleventh Amendment immunity: where such a claim can be determined solely as a matter of law, interlocutory appeal is allowed. *E.g.*, *Minotti v. Lensink*, 798 F.2d 607, 609 (2d Cir. 1986) (Eleventh Amendment clearly bars claim for money damages against state official acting in official capacity), *cert. denied*, 482 U.S. 906 (1987); *Dube v. State Univ. of New York*, 900 F.2d 587, 594 (2d Cir. 1990) (Second Circuit had previously determined that State University of New York was an "integral part of the government of the State" entitled to Eleventh Amendment immunity); *Coakley v. Welch*, 877 F.2d 304, 305-06 (4th Cir. 1989) (state official clearly a proper defendant in suit for prospective injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908)); *Loya v. Texas Dep't of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam) (Fifth Circuit had previously "clearly established"

[4]Like all circuits, the First Circuit has followed *Mitchell* and, when faced with a claim of qualified immunity that can be determined solely as a matter of law, will hear an interlocutory appeal. *E.g.*, *Roque-Rodriguez v. Mova*, 926 F.2d 103, 106 (1st Cir. 1991); *De Abadia v. Izquierdo Mora*, 792 F.2d 1187, 1189 (1st Cir. 1986).

the Eleventh Amendment immunity of the sole defendant, the Texas Department of Corrections); *Kroll v. Bd. of Trustees of Univ. of Illinois*, 934 F.2d 904, 908 (7th Cir.) (Seventh Circuit had previously ruled that Board of Trustees was a state agency entitled to Eleventh Amendment immunity), *cert. denied*, 112 S.Ct. 377 (1991); *Schopler v. Bliss*, 903 F.2d 1373, 1379 (11th Cir. 1990) (per curiam) (Eleventh Circuit had previously established that Florida had not waived its Eleventh Amendment immunity).[5]

The result reached by the First Circuit in this case on the issue of immediate appealability is in harmony with the decisions of the other circuits. The submissions to the district court and the First Circuit relating to the merits of PRASA's claim, *see* C.A. App. 20-165, demonstrate that the claim involved questions of fact and could not have been determined in PRASA's favor solely as a matter of law. The petition should be denied because there has been no showing that *any* circuit would have taken jurisdiction over PRASA's interlocutory appeal.

II.

THIS IS NOT A SUITABLE CASE TO RESOLVE IMPORTANT ISSUES CONCERNING THE SCOPE OF ELEVENTH AMENDMENT IMMUNITY.

PRASA would like this Court to decide whether the Eleventh Amendment involves a right not to be tried. As shown

[5]The other two cases cited by PRASA as "directly conflicting" with the First Circuit, *Eng v. Coughlin*, 858 F.2d 889 (2d Cir. 1988), and *Chrissy F. v. Mississippi Dep't of Public Welfare*, 925 F.2d 844 (5th Cir. 1991), do not address the issue presented in this case. *Eng* involved a claim of Eleventh Amendment immunity raised by defendants on a summary judgment motion that had been ignored by the district court; the Second Circuit did no more than remand the issue to the district court for its consideration. 858 F.2d at 897. *Chrissy F.* involved a minor clarification of a district court order that had *granted* the defendants' motion for summary judgment based on Eleventh Amendment immunity. 925 F.2d at 848-49.

above, that issue is far too broadly framed and is not squarely presented in this case. There are, moreover, several additional reasons why the petition should be denied.

A. The First Circuit's Decision Accords with This Court's Recent Decisions Relating to "Rights Not to Be Tried."

The First Circuit considered this Court's recent admonition concerning the facility with which alleged "rights not to be tried" can be claimed. In *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), this Court held that the denial of a criminal defendant's motion to dismiss on the ground of improper publication of grand jury proceedings was not immediately appealable. It cautioned:

> One must be careful . . . not to play word games with the concept of a "right not to be tried." In one sense, any legal rule can be said to give rise to a "right not to be tried" if failure to observe it requires the trial court to dismiss [the case]. But that is assuredly not the sense relevant for purposes of the exception to the final judgment rule.

Id. at 801 (citations omitted); *see Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) ("[I]n some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial. But the final-judgment rule requires that except in certain narrow circumstances . . . litigants must . . . [wait] until the end of proceedings before gaining appellate review"); *see also United States v. MacDonald*, 435 U.S. 850, 860 n. 7 (1978) (denying interlocutory appeal of denial of motion to dismiss based on alleged violation of Sixth Amendment right to speedy trial, even though there is always value "in triumphing before trial, rather than after it").

PRASA's defense, like many pretrial defenses, is a "right not to be tried" in the sense that a favorable ruling would allow it to avoid trial. But PRASA's claim of a broad exemption from any pretrial or trial proceedings is unpersuasive in this case, where discovery is almost completed and the case is close to trial. PRASA has not availed itself of all of the opportunities available to it to seek to avoid the burdens of litigation. As one example, PRASA has never sought a stay of the district court proceedings from this Court and has instead, from July 1991 through the present, initiated and engaged in substantial pretrial proceedings. Although PRASA has not waived whatever Eleventh Amendment defense it may have,[6] it has substantially weakened its claim that it is entitled to interlocutory review.

B. The First Circuit's Decision Accords with Decisions of this Court Construing the Eleventh Amendment.

The First Circuit's decision is in harmony with the decisions of this Court. In *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), upon which the instant decision is based, the First Circuit considered this Court's decisions concerning Eleventh Amendment immunity and qualified immunity, especially this Court's decision in *Mitchell*. The First Circuit concluded that the interests underlying Eleventh Amendment immunity could be adequately vindicated upon an appeal from a final judgment. *Id.* at 407. It reasoned that *Libby* was different from *Mitchell* because *Libby* involved state defendants sued in their official capacity, not officials like Mitchell who would suffer the pernicious consequences of lawsuits brought against them in their individual capacities. *Id.* at 405-06.

[6] M&E has stipulated that PRASA's filing of an answer and assertion of counterclaims will not be deemed to constitute a waiver of any Eleventh Amendment immunity that PRASA may enjoy. Exhibit 11, Appendix to M&E's Motion to Dismiss Appeal filed in the Court of Appeals.

The differences between the interests underlying personal immunity and Eleventh Amendment immunity were recently noted by this Court in *Hafer v. Melo*, 112 S.Ct. 358 (1991). After recognizing that the "Eleventh Amendment bars suits in federal court 'by private parties seeking to impose a liability which must be paid from public funds in the state treasury,'" *id.* at 364 (quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)), this Court rejected a claim that the Eleventh Amendment barred suits against state officials sued in their individual capacities under § 1983. It reasoned that while imposing liability on state officers could hamper their performance of public duties, "such concerns are properly addressed within the framework of our personal immunity jurisprudence" and not the Eleventh Amendment. 112 S.Ct. at 364-65.

None of the cases cited by PRASA at Pet. 17-18 addressed the claimed Eleventh Amendment immunity of a public corporation that operates as a private enterprise. Although this Court has not ruled upon the issue, it long ago intimated that public corporations, much like counties, municipalities, and political subdivisions, are not shielded by Eleventh Amendment immunity. *See Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636, 645 (1911) ("neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty"). The decision of the First Circuit is in harmony with the decisions of this Court concerning Eleventh Amendment immunity as well as personal immunity.

C. This Case Does Not Raise Any Federalism Concerns.

Contrary to PRASA's assertion, *cf.* Pet. 22-24, this case does not raise any federalism concerns.

First, the issue of whether Puerto Rico is a "State" entitled to the protection of the Eleventh Amendment has not been decided by this Court.[7] This Court has wrestled for many years with the status of the Commonwealth, holding that it is a State for some purposes and not a State for others. *E.g., Balzac v. Porto Rico*, 258 U.S. 298, 304-05 (1922) (Sixth Amendment did not apply to Puerto Rico as it was not a State or territory that had been incorporated into the United States); *see generally Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 580-97 (1976) (collecting statutes and cases regarding whether Puerto Rico is State or territory). The uncertainty is particularly significant in this case, for the claim of immunity is being raised not by the Commonwealth itself but by a Puerto Rican public corporation.

Second, federalism concerns cannot be evaluated without assessing, at least initially, the substantiality of the claimed immunity. Unless the Court were to adopt a rule that every claim of Eleventh Amendment immunity, however frivolous or insubstantial, must be reviewed on an interlocutory basis, the Court will have to make a preliminary decision both as to the applicability of the Eleventh Amendment to Puerto Rico and as to the substantiality of PRASA's claim, a claim not fully developed in the record below.

[7] Although this Court has commented that the government established in Puerto Rico in 1900 probably comes within "the general rule exempting a government sovereign in its attributes from being sued without its consent," *Porto Rico v. Castillo*, 227 U.S. 270, 273 (1913), it has not extended Eleventh Amendment protection to Puerto Rico. The First Circuit has ruled that, even though it is not a State, Puerto Rico enjoys the shelter of the Eleventh Amendment. *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983).

Third, if there is a federalism concern to be considered here, it is that the Court should not grant discretionary review to decide a question such as the scope of Eleventh Amendment immunity in a case where no State, and no "arm" of a State, is a party before this Court.

D. There is Substantial Doubt Whether, on the Merits, Petitioner is Entitled to Eleventh Amendment Immunity.

This Court, while not asked to rule on the merits of PRASA's substantive claim,[8] should not exercise its discretionary review power over a procedural issue when there is substantial doubt whether PRASA is entitled to Eleventh Amendment immunity. The seriousness of that doubt is demonstrated by PRASA's complete autonomy from the Commonwealth, both in practice and in law, *see supra* at 3-4, and by judicial rejections of PRASA's claims that it operates as a part of the Commonwealth, *id.*, and that it enjoys Eleventh Amendment immunity.

The First Circuit has three times cast substantial doubt on PRASA's claimed immunity.[9] First, in *Paul N. Howard*, the

[8] PRASA's petition seeks review only of the limited jurisdictional issue. *See* Pet. i. If by citing *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982), *Florida Dep't of Health and Rehabilitation Serv. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981), and *Alabama v. Pugh*, 438 U.S. 781 (1978), PRASA is suggesting the Court should summarily determine the merits of its claim of Eleventh Amendment immunity, that suggestion should be easily rejected. Discovery in this case, both on the claim of Eleventh Amendment immunity and on the underlying contractual dispute, is ongoing and had barely begun when the record was submitted to the First Circuit.

[9] The First Circuit in *Ainsworth Aristocrat Int'l Pty., Ltd. v. Tourism Co. of Puerto Rico*, 818 F.2d 1034 (1st Cir. 1987), enumerated the factors relevant to the determination of a state agency's claim of Eleventh Amendment immunity. PRASA has exaggerated the effect of *Ainsworth* on subsequent First Circuit decisions. *Cf.* Pet. 7. The First Circuit's tentative statement in *Ainsworth* that the Puerto Rico Tourism Company was not an arm of the Commonwealth was based on the "erroneous impression" that the Tourism Company was funded primarily through slot machine concession revenues.

First Circuit held that PRASA had waived any Eleventh Amendment defense in that case and expressed "doubt that PRASA is sufficiently an arm of the state to qualify for the protection of the Eleventh Amendment." 744 F.2d at 886. The First Circuit reasoned that autonomous government corporations like PRASA are not "normally immune from suit in federal court," that PRASA's operations "generate substantial revenue," and that PRASA is "financially independent" from the Commonwealth. *Id.* Second, in denying PRASA's petition for rehearing of the *Paul N. Howard* case, the First Circuit stated that it remained "convinced that PRASA enjoys no Eleventh Amendment immunity." *Id.*[10] Finally, in denying PRASA's motion for a stay in this case, the First Circuit confirmed its "substantial doubt" that PRASA is entitled to Eleventh Amendment immunity. Pet. App. A-12.

E. Petitioner's Claim Will Be Reviewable in Due Course.

There is a strong judicial and Congressional policy against

In re San Juan Dupont Plaza Hotel Fire Litig., 888 F.2d 940, 943 n. 3 (1st Cir. 1989). When presented with the fact that the Tourism Company received 70-75% of its funds directly from the Commonwealth and an array of other facts in a fully developed record, the First Circuit concluded that the Tourism Company was entitled to Eleventh Amendment protection. *Id.* at 943. Although PRASA argued below that it was indistinguishable from the Tourism Company and the Puerto Rico Ports Authority, it by no means "demonstrated" that. C.A. App. 37-140, 162-65; *cf.* Pet. 7. The United States District Court for the District of Puerto Rico has recently determined that the Ports Authority, acting in the proprietary capacity of contracting for the construction of a cargo building, was not entitled to Eleventh Amendment immunity. *Caribbean Airport Facilities, Inc. v. Puerto Rico Ports Auth.*, No. 90-2271 (D. P.R. January 27, 1992). PRASA was acting in a similar proprietary capacity when it negotiated and contracted with M&E for program management services.

[10] In its petition for certiorari filed in the *Paul N. Howard* case, PRASA told this Court that the First Circuit's opinion contained a "holding that PRASA possesses no [Eleventh Amendment] immunity." PRASA's Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit at 6-7, filed in *Puerto Rico Aqueduct and Sewer Auth. v. Paul N. Howard Co.*, No. 84-868 (U.S. 1985). PRASA now tells this Court that the First Circuit in *Paul N. Howard* "left open" the issue of PRASA's Eleventh Amendment immunity. *See* Pet. 6 n. 7.

piecemeal appeals. *E.g., Cohen*, 337 U.S. at 545-46; 28 U.S.C. § 1291 (appeal "from all final decisions of the district courts"). In general, appeal allows "review, not . . . intervention" and if a matter "remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Cohen*, 337 U.S. at 546. Interlocutory review is a narrow exception to the final judgment rule and rests on the policy that only an exceptionally small set of cases should be interrupted by interlocutory review and thus spare parties the normal burdens of litigation. For the reasons stated above, that policy would not be served in this case.

This case is poised for trial and PRASA has not waived whatever Eleventh Amendment immunity it may have. It can seek review of a final judgment in the ordinary course in the context of a complete record.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

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Dated: February 18, 1992

REPLY

BRIEF

(3)

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QUESTION PRESENTED

In departing from the decisions of six federal courts of appeals, did the Court of Appeals for the First Circuit err in holding that it lacked jurisdiction under 28 U.S.C. § 1291 to review interlocutory orders denying claims of Eleventh Amendment immunity from suit as collateral final orders under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)?

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TABLE OF AUTHORITIES

No. 91-1010

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
Petitioner,

v.

METCALF & EDDY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO BRIEF IN OPPOSITION

The Petitioner, Puerto Rico Aqueduct and Sewer Authority (the "Authority" or "PRASA"), replies to arguments first raised in the Brief in Opposition filed by the Respondent, Metcalf & Eddy, Inc.

In the decision below, the First Circuit held that interlocutory orders denying claims to Eleventh Amendment immunity cannot be appealed as "collateral final orders" under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Acknowledging the conflict among the circuits on this threshold question of jurisdiction over a general category of cases, the First Circuit dismissed the Authority's appeal without addressing the merits of the Authority's particular claim to immunity. In its Brief in Opposition, however,

Metcalf & Eddy erroneously argues that the First Circuit dismissed the appeal because the merits of the Authority's particular claim to immunity could not be determined as a matter of law.

Metcalf & Eddy then asserts that because of uncertainty whether the Eleventh Amendment applies to Puerto Rico and because of doubts whether the Authority is an arm of the Commonwealth of Puerto Rico, this case is not suitable for this Court's review. In fact, the opposite is true: granting the Petition for Writ of Certiorari and reversing the First Circuit will ensure that these important questions can be raised and addressed at the proper time in the proper forum.

I.
THE PETITION FOR CERTIORARI PRESENTS A QUESTION OF APPELLATE JURISDICTION OVER A CATEGORY OF CASES.

The jurisdiction of the United States courts of appeals is drawn in terms of "categories of cases." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988); *Carroll v. United States*, 354 U.S. 394, 405 (1957). The Petition for Writ of Certiorari asks this Court to resolve a conflict among the United States courts of appeals as to whether of a particular category of interlocutory orders are appealable as "collateral final orders" under *Cohen*, 337 U.S. 541 (1949).

In the decision being appealed, *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10 (1st Cir. 1991); Pet. App. A, and in the decision upon which it

is based, *Libby v. Marshall*, 833 F.2d 402, 404-07 (1st Cir. 1987), the First Circuit held that interlocutory orders denying claims of Eleventh Amendment immunity from suit comprise a general category of cases that are not appealable under *Cohen* as collateral final orders. The First Circuit acknowledged that its decision on this "threshold question of appellate jurisdiction," Pet. App. at A-3, conflicted with decisions of four other circuits.[1] Holding that interlocutory orders denying claims to Eleventh Amendment immunity cannot be appealed before trial, the court of appeals did not "consider the merits of PRASA's Eleventh Amendment defense" and took "no view as to whether PRASA is actually entitled to the claimed immunity." *Id.* at A-8, n.6.

In its Brief in Opposition, Metcalf & Eddy, Inc., characterizes the conflict among the courts of appeals as "feigned," Opp. at 7, even though six circuits have explicitly recognized the conflict.[2] Instead, Metcalf & Eddy errone-

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[1] "Cases from four of our sister circuits hold, contrary to *Libby*, that denials of Eleventh Amendment immunity claims are immediately appealable." *Metcalf & Eddy, Inc.*, 945 F.2d at 13 (citing cases); Pet. App. at A-7.

[2] In addition to the First Circuit, the conflict has been explicitly acknowledged by the Second Circuit, *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 502 (2d Cir. 1990) (citing *Libby*, 833 F.2d at 405 (1st Cir. 1987) as contradicting general authority); the Sixth Circuit, *Corporate Risk Management Corp. v. Solomon*, Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001, *5 (6th Cir. July 2, 1991), *petition for cert. filed on other grounds sub nom. Coleman v. Corporate Risk Management Corp.*, 60 U.S.L.W. 3388 (U.S. Nov. 26, 1991) (No. 91-766) (same); the Seventh Circuit,

ously asserts that the appeal in this case was -- or could have been -- dismissed because the merits of the Authority's claim to Eleventh Amendment immunity "could not be determined, at least in its favor, solely as a matter of law." Opp. at i.

Metcalf & Eddy's expedient interpretation is contradicted by the First Circuit's own statements that it dismissed the Authority's appeal because the appeal belonged to a category of cases over which the court had no jurisdiction. Metcalf & Eddy's interpretation is inconsistent with the district court's disposition of the Authority's claim to Eleventh Amendment immunity as a matter of law:

> In addition, the defendant is not entitled to Eleventh Immunity [sic] in this case because of its ability to raise funds for payment of its contractual obligations which do not affect the Commonwealth's funds. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

Pet. App. B at A-9.

Kroll v. Board of Trustees, 934 F.2d 904, 906 (7th Cir.), *cert. denied*, 112 S. Ct. 377 (1991) (same); the Ninth Circuit, *Marx v. Government of Guam*, 866 F.2d 294, 296 n.2 (9th Cir. 1989) (same); and the Eleventh Circuit, *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1508 (11th Cir. 1990) (same). Although Metcalf & Eddy cites *Yonkers Bd. of Educ.* and *Corporate Risk Management Corp.* as holding "precisely what the First Circuit held," Opp. at 7, in fact, both decisions explicitly acknowledged a conflict with the First Circuit over the threshold question of jurisdiction.

There is nothing in the First Circuit's or the district court's decisions that states or implies that either court was unable to determine the merits of the Authority's claim, or that either court left unresolved factual issues open for further development.[3] If such factual issues existed, the First Circuit should have remanded the case to resolve them. *See, e.g., Ainsworth Aristocrat Int'l Pty. v. Tourism Co.*, 818 F.2d 1034, 1038-39 (1st Cir. 1987) (remanding "for full hearing on the Eleventh Amendment issue."). The First Circuit can determine that unresolved factual issues exist in this case only after it exercises jurisdiction over the general category of interlocutory orders denying claims to Eleventh Amendment immunity.

II.
THIS CASE PRESENTS IMPORTANT FEDERALISM CONCERNS.

Although twenty states and two Commonwealths as *amici* recognize the important federalism concerns raised by the Petition, Metcalf & Eddy argues that this case presents none. Metcalf & Eddy first argues that no federalism concerns are present because of "uncertainty" whether the Eleventh Amendment applies to Puerto Rico. Opp. at 14.

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[3] Metcalf & Eddy alludes to unidentified "submissions to the district court and the First Circuit," which it asserts demonstrate that the Authority's claim to immunity "involved questions of fact" that could not have been determined as a matter of law. Opp. at 10. The court of appeals never mentioned unresolved "issues of fact" as a basis for declining appellate jurisdiction.